

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 25, 2008 Session

**BMG MUSIC v. LOREN L. CHUMLEY, in her capacity as
COMMISSIONER OF REVENUE FOR THE STATE OF TENNESSEE**

**Appeal from the Chancery Court for Davidson County
No. 06-1234-I Claudia Bonnyman, Chancellor**

No. M2007-01075-COA-R9-CV - Filed May 16, 2008

The trial court granted Plaintiff/Taxpayer's motion to compel discovery of documents that Defendant Department of Revenue asserted were not subject to disclosure under the Taxpayer Confidentiality Act. We granted permission for interlocutory appeal, and reverse.

**Tenn. R. App. P. 9 Appeal by Permission; Judgment of the Circuit Court Reversed; and
Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and FRANK G. CLEMENT, JR., J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter, and Mary Ellen Knack, Senior Counsel, for the appellant, Loren L. Chumley, in her capacity as Commissioner of Revenue for the State of Tennessee.

Patricia Head Moskal and Joseph W. Gibbs, Nashville, Tennessee, for the appellee, BMG Music.

OPINION

This interlocutory appeal arises from the trial court's grant of Plaintiff/Taxpayer's motion to compel discovery of certain documents in response to Defendant Department of Revenue's ("the Department's") motion to dismiss based on the limitations period applicable to the filing of a suit challenging the Department's denial of a claim for refund under Tennessee Code Annotated § 67-1-1802. The facts relevant to our disposition of the issue raised on appeal, as we perceive that issue, are not disputed. Plaintiff Taxpayer/Appellee BMG Music ("BMG") is a New York partnership that produces, distributes, and sells musical recordings. Its principal place of business is located in New York, New York. The Department conducted a sales and use tax audit of BMG's books and records for the tax period January 1, 1996 through December 31, 2001, which resulted in a tax assessment in the amount of \$552,882.00, plus interest. BMG was notified of the assessment by written Notice of Assessment dated March 30, 2003. In August 2003, BMG paid the assessed amount, plus interest, resulting in a total payment of \$749,287.00. On March 3, 2004, BMG filed a claim for credit or

refund with the Department. On November 17, 2005, the Department notified BMG in writing that its claim for refund had been partially approved following an audit of the documentation provided with its claim for refund. The Department advised BMG that it tentatively had approved a refund in the amount of \$451,079.60 pending approval by the Attorney General's office. It denied BMG's claim for refund of taxes applicable to the cost price of dubs used for advertising and promotional purposes. The Department's November 2005 letter further stated:

It is the Audit Division's understanding that your company wishes to contest this issue in the informal conference process. Should you prevail at the conference level, an additional adjustment will be made to your audit to remove the taxes assessed on the production costs of the masters and an additional refund will be issued for that amount at that time. To receive additional information regarding the conference process and to request an informal conference, you may contact the Hearing Office[.]

In January 2006, BMG requested an informal conference, which was scheduled for June 13, 2006. By letter of April 12, 2006, the Department responded to correspondence received from BMG regarding a rescheduling request. In its April 2006 letter, the Department advised BMG:

[T]he portion of the original Claim for Refund which related to the tax on the cost price of the duplicate CDs entering Tennessee was denied for refund. Your clients were officially notified of this by letter dated November 17, 2005. No additional action will be taken by the Department on the amounts in question. Your clients may exercise their rights governed in T.C.A. Sec. 67-1-1802 which states that legal action protesting the Department's determination on the original claim may be filed in Chancery Court within 6 months of the denial. According to Department records, the deadline for your clients to file suit is May 17, 2006.

An informal taxpayer conference apparently was held prior to on or about April 27, 2006, to discuss use taxes assessed by the Department on 1) various items purchased from Harris Graphics and 2) on the value of recorded dubs. On May 10, 2006, the Department responded in writing to the parties' conference discussion. The Department stated that, "after reviewing the documentation provided, the Department has determined that it should not have assessed the Taxpayer use tax on the items" purchased from Harris Graphics. Thus, the assessed use tax on these items was removed from the assessment. The Department determined, however, that the dubs were tangible personal property that were purchased from a Tennessee dealer and that title or possession to the personal property passed in Tennessee. The Department determined that the value of the dubs was, therefore, subject to Tennessee use tax.

On May 17, 2006, BMG filed a complaint seeking a refund of use taxes assessed by the Commissioner for the tax period 1996 through 2001. The Department filed a motion to dismiss on June 21, 2006. In its motion, the Department argued that, under Tennessee Code Annotated § 67-1-1802, BMG's March 3, 2004, claim for refund was deemed denied six months after it was filed with the Department where it was not determined by the Department within six months. The Department

asserted that, under section 67-1-1802, BMG had six months from the date of presumptive denial within which to file its action in the chancery court. The Department accordingly asserted that BMG's May 17, 2006, action in the chancery court was untimely filed where it was not filed within six months following September 3, 2004. Additionally, the Department asserted that, under "the Wilder Bill" codified at Tennessee Code Annotated 67-1-1804, the procedure established by section 67-1-1802 is the exclusive procedure available to the taxpayer, and the court has no jurisdiction over actions filed outside the statutory procedures. The Department's motion to dismiss was set to be heard on August 25, 2006.

In August 2006, BMG filed its first request for production of documents. In its request, BMG requested

[a]ll files and other documents relating to the Department of Revenue's audit of Plaintiff, including, but not limited to, all audit files, audit reports and work papers, analyses, schedules, correspondence, letters, memoranda, notes, electronic mail messages, summaries, spreadsheets, and other documents relating in any way to the Department of Revenue's audit of Plaintiff.

It further requested all files and documents relating to BMG's claim for refund; to the informal taxpayer conference held on April 27, 2006, and the Department's May 10, 2006 letter; all documents supporting the Department's assessment of taxes; and all documents received by the Department from BMG. On August 22, 2006, the parties agreed that the August 25 hearing should be postponed until after the Department responded to BMG's request for documents.

On November 21, 2006, BMG moved to compel discovery. In its motion, BMG asserted "the documents requested were narrowly tailored to request information relevant to the merits of the motion to dismiss." BMG asserted,

[t]he issue raised by the motion to dismiss concern [sic] the filing of Plaintiff's administrative refund claim, when that refund claim should have been deemed "complete," whether there was a waiver by the Department of Revenue, and, ultimately, whether this lawsuit was timely filed.

It further asserted that the Department objected and withheld "a number of documents" on the basis that they were protected by disclosure under Tennessee Code Annotated 67-1-1701, *et seq.*, the Taxpayer Confidentiality Act (the "confidentiality act"). BMG further asserted that the majority of the documents included in the Department's log of privileged documents were "directly related to the audit of Plaintiff and Plaintiff's refund claim." BMG additionally asserted that the documents it requested were directly related to the audit of BMG, and were not "tax administration information" as defined by the confidentiality act.

The Department filed a motion in opposition to BMG's motion to compel discovery in December 2006. The Department asserted that the withheld documents sought by BMG were not

relevant to the Department's motion to dismiss. The Department argued that, contrary to BMG's assertion, the date on which BMG's refund claim arguably was "deemed complete" is irrelevant where section 67-1-1802(b) provides that the relevant date for operation of the statute is the date on which the refund claim is received by the Department. The Department argued that BMG already knew the date on which its refund claim was received by the Department. Finally, the Department asserted,

[i]f plaintiff was granted a waiver of the statute of limitations, plaintiff should certainly know that and be in possession of any such document granting such a waiver. If plaintiff does not know if it was granted a waiver, it could not possibly have relied on that waiver. Accordingly, the documents plaintiff seeks to compel in this motion are not necessary for plaintiff to respond to defendant's motion to dismiss.

The Department also asserted that the documentation it withheld was protected from disclosure under the confidentiality statute, and that the documents did not constitute "tax information" that must be disclosed to BMG.

In December 2006, the trial court ordered the Department to comply with BMG's discovery requests, but stated that the Department could seek an *in camera* review of and ruling on documents the Department believed to "contain information regarding the Commissioner's tax policy as to assessments in general." The trial court determined the documents withheld by the Department constituted "tax information" and were not privileged under the confidentiality act.

In January 2007, the Department filed a motion for interlocutory appeal pursuant to Rule 9 or, in the alternative, to reconsider, alter, or amend pursuant to Tennessee Rule of Civil Procedure 59.04. In its motion and memorandum, the Department sought permission for interlocutory appeal on the basis that the trial court's ruling was inconsistent with the confidentiality act and with case law. It further asserted that to disclose the documents it asserted were confidential, which included "email addressing the application of tax laws to other taxpayers," would violate Tennessee Code Annotated § 67-1-1709(a) and would constitute a Class E felony. The Department asserted that the withheld documents fell into five categories: 1) email discussing the status of the refund claim and/or the informal conference; 2) hand-written notes of employees of the Department; 3) email and memoranda discussing the basis of the assessment, adjustments, and documents produced in connection with the audit, refund claim, informal conference, and issues raised in the conference; 4) forms created by the Department used in connection with the audit; 5) email and memoranda discussing decisions and rulings involving other taxpayers. In its alternative motion to reconsider, alter or amend under Rule 59.04, the Department asked the court to set aside its order to compel with respect to the fifth category of documents, disclosure of which the Department asserted constituted a Class E felony under Tennessee Code Annotated § 67-1-1709(a) where the documents contained information regarding other taxpayers. The trial court granted the motion for interlocutory appeal on May 8, 2007. On June 14, 2007, we granted permission for interlocutory appeal of the trial

court's order granting BMG's motion to compel discovery. We now reverse the trial court's order to compel and remand for further proceedings.

Issue Presented

This Court's order of June 13, 2007, granting permission for interlocutory appeal did not certify an issue for appeal other than providing that the appeal "concerns a discovery dispute between a taxpayer and the Commissioner of Revenue over the application of Tenn. Code Ann. § 6[7]-1-1701 et seq." The issue presented by this case, as we perceive it, is whether the trial court erred in granting BMG's motion to compel discovery of documents asserted by BMG to be relevant and necessary to the adjudication of the Department's motion to dismiss based on Tennessee Code Annotated § 67-1-1802.

Standard of Review

We review a trial court's decision regarding pre-trial discovery matters under an abuse of discretion standard. *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992). The appellate courts will find an abuse of discretion "when the trial court applies an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.'" *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)(quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006)(citing *Howell v. State*, 185 S.W.3d 319, 337 (Tenn. 2006))).

Analysis

We begin our analysis of the trial court's order compelling discovery of documents asserted by the Department to be protected from disclosure under the confidentiality act by noting the procedural posture from which this interlocutory appeal arises. As the Department asserts in its brief to this Court, the trial court's discovery order was entered in the context of adjudicating the Department's motion to dismiss based on the limitations period provided by Tennessee Code Annotated § 67-1-1802. Section 67-1-1802 as it existed in 2006 provided, in pertinent part:

(b)(1) All claims for refund filed pursuant to this section shall be finally determined within six (6) months following receipt of the claim. If the claim for refund is denied, the commissioner shall promptly notify the claimant of the denial and the claimant's right to file a suit for refund in the appropriate chancery court in this state within six (6) months from the date of denial.

(2) If a claim is not determined within the six-month period following receipt by the commissioner of such claim, the claim shall be deemed to be denied for the purpose of filing suit in chancery court.

(c)(1) Upon denial by the commissioner of a claim for refund, or upon the expiration of the six-month period following receipt by the commissioner of the claim, whichever occurs first, the taxpayer may file suit against the commissioner

within six (6) months in the appropriate chancery court of this state for a refund. The chancery court shall conduct a de novo trial of the suit.

(2) The commissioner, by written notice promptly delivered to the taxpayer, may waive the requirement that the taxpayer file a claim for refund, in which case the taxpayer may file suit in the appropriate chancery court of this state for a refund within six (6) months following the date of such waiver by the commissioner, and such suit shall proceed in all respects, including for the purpose of determining the date from which interest thereon should be calculated, as if proper and timely claim for refund had been filed by the taxpayer, and either denied or not acted upon by the commissioner within the period specified herein.

Tennessee Code Annotated § 67-1-1802(b)&(c)(2006).¹

BMG asserts the documents it seeks are relevant to the determination of whether its claim was timely filed under the statute. The Department, on the other hand, asserts the statute is clear on its face, that there is no dispute regarding when BMG filed its claim for refund, and that, assuming BMG is asserting the Department waived the limitations period, the documents withheld by the Department are not relevant to a waiver defense.

We must agree with the Department that, regardless of any documents produced internally by the Department, the provisions of section 67-1-1802 are unambiguous with respect to the time within which a taxpayer may file an action in chancery court after filing a claim for refund with the Department. The section in effect when this action was filed in chancery court provided that the six-

¹The Code as amended effective January 1, 2008, provides:

(b)(1) All claims for refund filed pursuant to this section shall be finally determined within six (6) months following receipt of the claim. If the claim for refund is denied, the commissioner shall promptly notify the claimant of the denial and the claimant's right to file a suit for refund in the appropriate chancery court of this state within one (1) year from the date that the claim for refund was filed with the commissioner.

(2) If a claim is not determined within the six-month period following receipt by the commissioner of such claim, the claim shall be deemed to be denied for the purpose of filing suit in chancery court.

(c)(1) A suit challenging the denial or deemed denial of a claim for refund shall be filed in the appropriate chancery court of this state within one (1) year from the date that the claim for refund was filed with the commissioner. The chancery court shall conduct a de novo trial of the suit.

(2) The commissioner, by written notice promptly delivered to the taxpayer, may waive the requirement that the taxpayer file a claim for refund, in which case the taxpayer may file suit in the appropriate chancery court of this state for a refund within one (1) year following the date of such waiver by the commissioner, and such suit shall proceed in all respects, including for the purpose of determining the date from which interest thereon should be calculated, as if proper and timely claim for refund had been filed by the taxpayer, and either denied or not acted upon by the commissioner within the period specified herein.

Tennessee Code Annotated § 67-1-1802(b)&(c)(Supp. 2007).

month limitations period began to run “[u]pon denial by the commissioner of a claim for refund, or upon the expiration of the six-month period following receipt by the commissioner of the claim, whichever occurs first[.]” Tennessee Code Annotated § 67-1-1802(c)(1)(2006). The section further provided that in the absences of an affirmative denial of a refund claim, the claim “shall be deemed to be denied for the purpose of filing suit in chancery court.” Tennessee Code Annotated § 67-1-1802(b)(2)(2006).

In this case, BMG’s claim for refund undisputedly was filed/received by the Department on March 3, 2004. Further, the commissioner undisputedly neither granted nor denied BMG’s claim within six months, or by September 2, 2004. Thus, under section 67-1-1802 as it existed when this lawsuit commenced, BMG’s claim was deemed denied on September 2, 2004. Accordingly, under the section, BMG had until six months following September 2, 2004, to file an action in chancery court. The record is clear and undisputed with respect to the filing of BMG’s claim with the commissioner, the commissioner’s inaction as of September 2004, and the ultimate filing of BMG’s claim in the chancery court in May 2006. We cannot fathom how any documents withheld by the Department would be relevant to this determination.

However, in light of the entirety of the circumstances in this case, including the Department’s November 2005 partial approval of BMG’s claim for refund; the Department’s April 2006 letter advising BMG that the deadline for filing suit was May 17, 2006; the April 2007 informal taxpayer conference; and the Department’s May 10, 2006, letter advising BMG of an additional partial refund of assessed taxes, we agree with the Department that the dispositive determination relevant to the Department’s motion to dismiss is whether the Department waived the applicable limitations period, assuming it is within the statutory power of the Department to do so. “[W]aiver is a voluntary relinquishment by a party of a known right.” *Reed v. Washington County Bd. of Educ.*, 756 S.W.2d 250, 255 (Tenn. 1988)(citations omitted). It “may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct . . .” *Id.* (citations omitted). A waiver may be either express or implied. *Id.* Oral or written statements relinquishing known rights or privileges constitute an express waiver. *Grimsley v. Kittrell*, No. M2005-02452-COA-R3-CV, 2006 WL 2846298, at *3 (Tenn. Ct. App. Sept. 29, 2006)(*no perm. app. filed*). Waiver may be implied “when a party’s conduct, although perhaps not the party’s words, shows the party’s conscious choice to give up rights or to forego benefits.” *Id.* (citing *Hoeftler v. Hoeftler*, No. M1998-00966-COA-R3-CV, 2001 WL 327897, at *4 (Tenn. Ct. App. Apr. 5, 2001)). However, it is well-settled that an implied waiver will not be presumed. Rather, the party asserting waiver bears the burden of proving that the party against whom waiver is asserted has, “by a course of acts and conduct, or by so neglecting and failing to act, . . . induce[d] a belief that it was [the party’s] intention and purpose to waive.” *Kentucky Nat’l Ins. Co. v. Gardner*, 6 S.W.3d 493, 499 (Tenn. App. 1999)(quoting *Baird v. Fidelity-Phenix Fire Ins. Co.*, 178 Tenn. 653, 162 S.W.2d 384, 389 (1942)(quoting *Farlow v. Ellis*, 81 Mass. 229, 231 (1860))). “In order to establish waiver by conduct, the proof must show some ‘absolute action or inaction inconsistent with the claim or right’ waived.” *Id.* (quoting *Koontz v. Flemming*, 65 S.W.2d 821, 825 (Tenn. App. 1933)). A party seeking to establish an implied waiver, or waiver by estoppel, must demonstrate that he “prejudicially changed his position in reliance upon the other party’s

conduct.” *Id.* at 501. The Department asserts that BMG necessarily has in its possession any documentation relevant to the question of whether it prejudicially relied on any conduct of the Department which thereby caused it to file its claim in chancery court beyond the statutory limitations period. We agree.

Although, as noted above, pre-trial discovery matters are within the sound of discretion of the trial court, “discretionary choices are not left to a court’s inclination, but to its judgment; and its judgment is to be guided by sound legal principles.” *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)(quoting Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 58 (2000) (citations and internal quotation marks omitted)). An abuse of discretion may be found ““when the trial court has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination.”” *Id.* (quoting 2 J. App. Prac. & Process at 59). We agree with the Department that the documents subject to the trial court’s order on BMG’s motion to compel are not relevant to the determination of whether BMG’s claim in the chancery court was timely filed.

We are not insensitive to the complexity of this litigation. However, in light of the above noted procedural posture from which this appeal arises, it was premature for the trial court to address whether the documents withheld by the Department are confidential and protected from disclosure under Tennessee Code Annotated § 67-1-1701, *et seq.*, where they are not relevant to the disposition of the Department’s motion to dismiss. We accordingly decline to address this issue as such a discussion would be advisory at this juncture.

Holding

In light of the foregoing, the trial court’s order granting BMG’s motion to compel discovery is reversed. This matter is remanded for further proceedings consistent with this Opinion. Costs of this appeal are taxed to the Appellee, BMG Music.

DAVID R. FARMER, JUDGE